***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

75-4021

BRIEF FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WESTINGHOUSE BROADCASTING COMPANY, INC., No. 75-4026
SANDY FRANK PROGRAM SALES, INC., No. 75-4025
WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA INC., and TWENTIETH CENTURY-FOX TELEVISION, No. 75-4024
CBS INC., No. 75-4036

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROS., INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
MGM TELEVISION,
UNITED ARTISTS CORPORATION,
MCA, INC., and TWENTIETH CENTURY-FOX TELEVISION
NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS and LORIMAR PRODS.,
MOTION PICTURES ASSOCIATION OF AMERICA, INC.,

Intervenors.

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ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission

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Intervenors.

## QUESTIONS PRESENTED

1. Whether the Commission could reasonably decide to retain the prime time access rule (PTAR)?

2. Whether the exemption from the rule for children's, public affairs and documentary programs can be sustained as a reasonable exercise of an agency's discretion to accommodate different public interest objectives?

3. Whether the basic rule may continue to be sustained as a permissible restraint under the First Amendment upon network and "off-network" programs?

4. Whether the addition of one more exemption to other established exemptions in the rule phrased in terms of general program content violates the First Amendment and Section 326 of the Communications Act?

COUNTERSTATEMENT

Petitioners NAITPD, Westinghouse, Sandy Frank Programs Sales, and CBS seek review of the Federal Communications Commission's Second Report and Order (J.A. 84-208), to the extent that it modified the Prime Time Access Rule (47 C.F.R. §73.658(k)). On the other hand, Petitioners Warner Brothers et al. request that the rule be set aside in its entirety. Jurisdiction is based upon 47 U.S.C. §402(a) and 28 U.S.C. §2342.

1. Background: The Original Access Rule.

A description of the lengthy proceedings leading to the adoption of the original access rule appears in this Court's opinion in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 473-76 (2d Cir. 1971), upholding the rule and the related financial interest and syndication rules. This access rule was adopted on May 4, 1970, 23 FCC 2d 382, 402, and affirmed with modifications on reconsideration, 25 FCC 2d 318, 337 (1970). It required that during one of the four evening hours in prime time (7-11 p.m. in the Eastern and Pacific Time Zones; 6-10 p.m. in the Central and Mountain Zones) no network or "off-network" [1/] programs

1/ Programs previously carried over a network.

be shown in network owned or affiliated stations in the top fifty television markets. Feature films that had been shown on television within the market within two years were similarly prohibited during the one hour of "access" time created by the rule.

The rule was the result of the Commission's finding that the three major networks controlled access to the prime time television schedule. From this the Commission concluded that:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. 23 FCC 2d at 394.

The Commission expressed its particular concern about television affiliates' "almost complete dependence on networks for viable economic operation," lessening network dominance over affiliates' and a "principal objective" of the rule was to diminish network dominance over the station operations of their affiliates. 25 FCC 2d at 329. See also this Court's opinion in Mt. Mansfield, 442 F.2d at 488 .

Although the Commission hoped its rule removing "the three-network funnel" for a portion of prime time programming might also encourage a "diversity of program

ideas," 23 FCC 2d at 395, it disavowed any intention of promoting "quality high cost programs" or any other particular types of programs, 23 FCC 2d at 397. However, on reconsideration, it did recognize that exemptions for certain categories of programming might thereafter need to be added. 25 FCC 2d at 334. The stated objective was simply to facilitate the development of "alternate sources of television programs." 23 FCC 2d at 397; see also 23 FCC 2d at 394, 396. To this end, the rule included a ban on "off-network" programs and recently televised feature films because their use during access time "would destroy the essential purpose of the rule to open the market to first run syndicated programs." [1/] 23 FCC 2d at 395.

In upholding the access rule, this Court rejected the argument that this rule violated the First Amendment

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1/ The Commission was not precluding locally originated programs, and indeed stated that filling the cleared time with such material would be in the public interest. 23 FCC 2d at 395 n.37. However, at the outset the main thrust was on increasing the opportunity for first-run syndicated material. 25 FCC 2d at 328 n.21. But it has developed that local programming has flourished under the rule, and in its latest decision the Commission emphasizes this public interest benefit flowing from the regulation. (J.A. 92-93, para. 15.)

with its restraint on network distributors whose products were barred, on licensees whose choice of programming was restricted and on viewers who might have preferred the programming prohibited by the rule. The Court stated:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d at 478.

Both this Court and the Commission acknowledged the experimental nature of the rule, 442 F.2d at 479 and 483n.42 and 23 FCC 2d at 396, and the Commission announced at the outset its intention to review developments and take any necessary remedial action. 23 FCC 2d at 401.

2. Multiple Requests For Waiver of the Rule.

The original rule contained an exemption for network programs concerning fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates. In addition, since the rule went into effect the Commission has had to consider numerous requests for waiver of the rule. Waivers have been granted for:

(a) one-time network news and public affairs programs;

(b) presentation of network news from 7-7:30 p.m.,

where it is preceded by a full hour of local news or public affairs material;

(c) sports runovers where a network telecast of a sports event normally would conclude prior to prime-time but in fact does not;

(d) special situations, such as the New Year's Day college football games, where all of the prime time network programming is devoted to the same programming; and

(e) particular "off-network" programs such as Wild Kingdom, Animal World, National Geographic, Six Wives of Henry VIII, America,[1/] and six children's specials.

Finally, waivers have been granted to allow for time zone differences. (J.A. 86, 100, 111, paras. 3, 30, 55).

3. The Present Proceeding.

On October 30, 1972, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making, 37 FCC 2d 900 (J.A. 1-49), to reexamine the access rule.

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1/ A review of a waiver for the America series is pending in National Association of Independent Television Producers v. FCC, D.C. Cir. No. 73-2052. It should be noted that all of these programs, except the Six Wives series, are documentaries which hereafter under the new rule would be exempt from the Commission's waiver scrutiny.

A total of 59 parties filed comments or participated in two days of oral argument held in July 1973, including independent producers and distributors, individual licensees, major film producers, the three networks, labor organizations and three "public" groups (J.A. 87, para. 5).

A Report and Order was released on February 6, 1974, 44 FCC 2d 1081, modifying the rule so as to eliminate access time on Sunday evenings and to reduce it to one half-hour other evenings. Further provisions permitted one of these six remaining half-hours, specifically designated as 7:30-8 p.m. or 6:30-7 p.m. depending on the time zone, to be used each week for network or "off-network" material consisting of children's specials, documentaries or public affairs programs, and prohibiting any use of feature film during these six half-hours. The Commission specified September 1974 as the effective date for these modifications.

This Court on March 12, 1974, denied petitions from NAITPD and others to stay the effective date of the revised access rule until September 1975, but did expedite its consideration of the various petitions for review. On June 18, it enjoined the Commission from making the changes in the rule effective before September 1975 and

dismissed the petitions without prejudice to their renewal after opportunity for the Commission to conduct any further proceedings it should deem appropriate. NAITPD v. FCC, 502 F.2d 249, 258 (2d Cir. 1974).

The Court did not consider the merits of the petitions before it, and it refrained from requiring further Commission hearings. 502 F.2d at 255, 258. However, it did indicate certain substantive areas where it believed additional consideration by the Commission "might be helpful." 502 F.2d at 258.

In light of the Court's opinion, the Commission released on July 17, 1974, a Further Notice Inviting Comments. 47 FCC 2d 930 (J.A. 50-56). Consumer groups and minority groups were invited by this Further Notice and by letters addressed specifically to many of them to discuss the rule generally, and more particularly, to comment upon six issues referred to in this Court's June opinion. Opportunity was given for a similar input from the public on these general and specific issues, and additional comments were invited from parties already in the proceeding concerning the six issues mentioned

by the Court's opinion.[1/] (J.A. 89, para. 9). Those filing comments were requested to propose an effective date for whatever changes they were advocating in the rule. (J.A. 51).

Extensive written comments were filed representing the views of twenty-five citizens or public groups, thirty private parties and two government agencies. (J.A. 118-19).

On November 15, 1974, the Commission released a Public Notice (J.A. 82-83) announcing the substantive provisions it proposed to incorporate into the prime time access rule, beginning in September 1975. A formal decisions to this effect[2/] was adopted on January 16, 1975,

1/ The Commission's specific attention in the Second Report and Order to the issues mentioned in this Court's 1974 opinion may be found as follows: (1) network dominance--J.A. 92-93, 97, paras. 15, 23; (2) effect on competition--J.A. 112-13; paras. 57-58; (3) impact on Hollywood--J.A. 96, 98, paras. 22, 24-25; (4) advertising in prime time--J.A. 94, para. 17; (5) minority programming--J.A. 92-93, 96, 114, paras. 15, 22 and 60; and (6) effect on playwrights and actors--J.A. 98, para. 26.

2/ The feature film provisions did not appear in the November 15 Public Notice.

in the Second Report and Order released the next day (J.A. 84-208).

4. The Rule Now Before The Court.

The Commission decided not to adopt again the changes which this Court last year found would have "sharply restricted" the access market by reducing access time "from fourteen to six or fewer half-hours per week." 502 F.2d at 254. Instead, the Commission retained the original access rule, except for the codification of certain waiver practices which have heretofore developed (7 p.m. network news, sports runovers, New Year's Day bowl games, time-zone differences, etc.) and a codification and extension of other waivers previously granted by means of an exemption for "network or off-network programs designed for children, public affairs programs or documentary programs" (J.A. 85, para. 2). The restriction in the original rule against feature films which has been shown in the market within two years was changed so that feature films are hereafter banned during the access period when they have previously appeared on a network, without regard to a time limitation. Otherwise, i.e., if they went directly into syndication from theatres, they may be shown without limitation (J.A. 109-10, para. 50).

To prevent the exemption thus created from being used to undercut its intention to retain the original access rule largely as is (J.A. 92, para. 13), the Commission admonished networks and licensees to use the new exemption with restraint and, in particular, to use it during access time on Saturday, the night most conducive so far to local programming and hour-long access shows, only for "compelling public interest reasons" (J.A. 103, para. 34).

Although not specified in the rule, the Commission stated in the Second Report and Order its expectation that stations would devote an appropriate portion of access time, or at least of total prime time, to material (whether it be local, syndicated or network programming) that is particularly directed to the needs and problems of their respective communities and service areas, including the special needs of minority groups (J.A. 114, para. 60).

5. Reasons for Retaining the Rule in Much the Same Form.

Upon further consideration after this Court's June 1974 decision, the Commission concluded that the access rule was accomplishing its primary objectives of decreasing network dominance by reducing network control over station time and developing alternative sources of

programs so as to increase licensees' freedom of choice in selecting programs. (J.A. 92-94, 97, paras. 14, 15, 16, and 23). Similarly, the rule has made it easier for licensees to exercise their personal judgments favoring programs no longer offered by the networks (J.A. 92-93, para. 15). The Commission thus decided that an increase in the opportunity for network and "off-network" programs of the magnitude contemplated by its Report and Order before the Court last year "is not warranted in light of the importance of the objectives of the rule" (J.A. 113, para. 59).

Another principal reason for retaining the rule was the significant stimulus it has provided to local programming activities (J.A. 92-93, 114, paras. 15 and 60). In addition, the Commission found the following benefits flowing from the rule:

(1) the increased programming of a public service character presented by ABC as a result of its greater profitability under the rule (J.A. 94, para. 17);

(2) the emergence of distributors who can finance the production of network and non-network programs resulting in an increased number of producers active in prime time (J.A. 94, para. 17); and

(3) the increased opportunity for non-national advertisers e.g., local business concerns, to gain access to prime time television, as well as providing an optional outlet for national advertisers who prefer to use spot rather than network messages (J.A. 94, para. 17).

In response to arguments that access programming lacks diversity and quality, the Commission said it was premature to evaluate the kind of programming likely to develop, "given reasonable certainty as to the rule" (J.A. 95, 112, paras. 18, 57). Moreover, the Commission pointed out that it had expressly disavowed when the rule was first adopted any intention of promoting "quality high cost" programs, 23 FCC 2d at 397, and had considered diversity of programming under the rule to be a hope rather than a primary objective (J.A. 92, para. 14). Finally, the Commission did not find the programming during access time to be as monotonous as portrayed by opponents of the concept of access time (J.A. 95, para. 19).

6. The Reasons For Exempting Programs Designed For Children, Public Affairs Programs and Documentary Programs From The Operation of the Rule.

While not prepared to reach a general conclusion that the prime time access rule had not contributed to diversity of television fare and could never do so, the

Commission did believe that the exemption described above should be inserted into the rule. It acted not only in the interests of correcting the rule's inhibiting effects on certain categories of programming and thus increasing diversity during access time, but also in the expectation that the new exemption would relieve the administrative burden placed upon the agency to take a "hard look" [1/] at requests for waiver of the rule with respect to particular programs. An examination of these past troublesome requests indicates that, with one exception, see footnote 1, page 5, supra, the programs at issue fall within the documentary or children's program categories included in the new exemption.

With respect to diversity as a justifying factor, the Commission acted after finding that the rule, as it now stands, has worked to inhibit the presentation during prime time of programs in the three categories covered by the exemption (J.A. 96, 99-102, 106, 108, paras. 21, 29, 30, 32, 33, 41 and 46).

The deficiency as far as network programming in these areas is concerned is manifested either by showing these programs at a time too late for viewing by the audience most concerned, i.e., children (J.A. 100, para. 30), a consequence directly traceable to the rule,

1/ WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

or by not showing them as much as before, during the reduced time made available for network programming (J.A. 101-02, paras. 32 and 33).

This deficiency in network programming has not been offset by programs of these types during the access period. There are only a small number of syndicated access (1) children's programs (J.A. 100, para. 30), (2) public affairs programs (J.A. 101, 105, paras. 32 and 38) and (3) documentary programs (J.A. 102, 105, paras. 33 and 38), in contrast to "the tremendous resources which the networks have for such [public affairs and documentary] programming" (J.A. 105, para. 38).

Since it is the Commission's rule which has been found to have the side effect of limiting the prime time presentation of certain categories of programming material, the Commission considered it to be its "affirmative duty to relax our restraint to permit such programming to be made more readily available." (J.A. 108, para. 46).

In view of the basic decision to maintain the original rule, the Commission concluded that it would be justified in making these limited changes effective in September 1975 (J.A. 115, paras. 63-64), the date this Court had mentioned in referring to more substantial proposed reductions in access time.

A motion for a stay pendente lite of the effective date of the exemption under discussion was denied by this Court on February 11, 1975, which then ordered expedited briefing and argument.

ARGUMENT

The Commission's decision to retain the prime time access rule was reasonable. The rule accomplished its primary objectives of increasing the diversity of sources of programs and reducing the previously almost total dependence of affiliates upon their networks for their prime time program choices. In addition, the rule has been found to have produced other benefits.

However, the goals underlying the prime time rule are not the sole objectives with which the Commission must be concerned. It was thus within the agency's discretion to incorporate into the rule an exemption for children's programs, public affairs programs and documentary programs as a means of furthering other objectives and also facilitating the administration of the rule.

This new exemption is consistent with the First Amendment and Section 326 of the Communications Act. From the inception of the prime time access rule both proponents and opponents have recognized that this rule brought about a unique situation in which some distinctions according to general program content would need to be made. This has been evidenced by other exemptions not here challenged, other proposed exemptions at the time the rule was first

adopted and waiver requests. The Commission has merely continued this established practice by formulating an exemption for three general categories, from each of which programs have heretofore been the subject of successful waiver requests.

## I. THE COMMISSION REASONABLY CONCLUDED THAT THE ACCESS RULE REMAINS IN THE PUBLIC INTEREST.

Warner Brothers and the other movie company opponents of the access rule argue that it has failed to accomplish what they allege are the two justifications for this Court's approval in the Mt. Mansfield decision, i.e. (1) a promise of diversity of programming and (2) a reduction of network dominance.

Diversity.

The Second Report and Order and the extensive briefs of the rule's vigorous supporters already before the Court have demonstrated that the main thrust of the access rule, at least in the short run, was towards a diversity of sources of programming (J.A. 92). In short, the foremost objective was to get more voices speaking during access time.

Seen in this light, the case has not been made for repealing, on grounds of an alleged lack of diversity, a rule upheld by this Court in its carefully considered decision less than four years ago. There are more speakers during prime time, including both syndicated and local producers (J.A. 92-94). The rule's success in this respect is clearly evidenced by the strong support it received from nearly all of the public groups whose participation

was encouraged by this Court. These groups generally based their support on the rule's impetus to local programs (J.A. 122-26).

Network Dominance.

The Court should reject the argument that the rule has increased network dominance. There are three relevant relationships subsumed under the term network dominance. These involve the relationship of networks to: (1) their affiliates; (2) producers of programs for network exhibition; and (3) advertisers.

The critical relationship as far as the prime time access rule is concerned, as distinguised from the financial interest and syndication rules, also approved in Mt. Mansfield, is the network-affiliate relationship. The Court and the Commission were concerned at the outcry from the affiliates among the petitioners in Mt. Mansfield which indicated that they had become so dependent on the networks that

> [T]hey clearly are not in a position to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships. (footnote omitted). 442 F.2d at 488; 25 FCC 2d at 329.

Four years later local stations have been found to have a new freedom (JA. 92-93) and there are no affiliates now beseeching this Court to strike down the rule. The resistance of NBC affiliates to carrying a proposed additional Saturday night program during the 1974-75 season evidences the rule's success in reducing network dominance of the prime time operations of their affiliated stations (J.A. 88n.8 and 103n.30).

Moreover, many leading access shows had little, if any, exposure on network owned stations, contrary to the argument of the rule's opponents that the network owned stations control the fate of access programs (See NBC Reply Comments and J.A. 133-34).

With respect to producers and advertisers, the detailed information contained in the reply comments of NBC described, in part, at (J.A. 132) justified the Commission's refusal to conclude that the access rule had increased network dominance as to them (J.A. 97). The essence of the information before the Commission was that there were many other factors, wholly apart from the access rule, which would logically account for the advertising and licensing figures cited by the movie companies as a basis for their claim of increased network dominance.

Pertinent here is the opinion from the Department of Justice submitted in the aftermath of the Court's recent opinion. The Department stated:

> [E]mpirical evidence is not yet reliable in this matter [increased network power] and ... all the relevant factors have not been adequately examined. Competitive policy and the Commission's responsibilities under the public interest test must be directed to long-term effects. The simple fact is that empirical evidence now available does not seem entitled to great weight in the present circumstances, since the prime time access rule was never given an opportunity to work. (J.A. 80).

Other Benefits.

The movie company opponents of the access rule ask this Court to strike it down on the basis of an alleged lack of diversity in access programs although, as discussed above, diversity of programming was not the central factor underlying the decision to adopt the rule. However, these opponents characterize the Commission's current consideration of the local programming advances under the rule and other benefits as "eleventh-hour arguments" (p. 63).

The Commission was justified in considering benefits found to be in the public interest even though they may not have constituted principal reasons for adopting the rule (J.A. 93n.16). In fact, this Court contemplated that the Commission would take into account matters such as local programming when it referred to the comments, without

limitation, which many persons and groups may have about the rule and invited the Commission "affirmatively [to] seek them out," including discussion from minority groups concerning the rule's effect "on programming for minorities." NAITPD v. FCC, 502 F.2d at 258.

These other benefits have been described elsewhere (J.A. 92-94 and supra at pp. 10-12) and need no repetition here.

## II. THE EXEMPTION FOR CHILDREN'S PROGRAMS, PUBLIC AFFAIRS PROGRAMS AND DOCUMENTARY PROGRAMS FROM THE OPERATION OF THE ACCESS RULE IS A RATIONAL EXERCISE OF THE COMMISSION'S AUTHORITY TO PURSUE OTHER OBJECTIVES IN THE PUBLIC INTEREST.

Throughout the following argument in defense of this exemption against the attacks from NAITPD and Sandy Frank the Commission will be relying upon three strands of sound administrative practice. These are: (1) The public interest, and not a "competition free haven for syndicators" 23 FCC 2d at 397, is the touchstone of the Commission's authority in the context of the access rule, as it is in all other areas of Commission policy -- National Broadcasting Co. v. U.S., 319 U.S. 190, 216 (1943); (2) The public interest is an evolving concept -- American Trucking Ass'n v. A.T. & S.F. RR. Co., 387 U.S. 397, 416 (1967) -- especially in a field of regulation as "dynamic" as broadcasting -- NBC, supra, 319 U.S. at 219; and (3) the strength of the administrative process rests in part upon its ability to make "expeditious adjustment[s] in the light of experience." American Airlines, Inc. v. CAB , 359 F.2d 624, 633 (D.C. Cir. 1966).

These fundamental concepts are critical not only to the decision adopting the new exemption, but also to the refusal to give the access rule a five-year guarantee, as some of its strongest supporters urged. The Commission's

judgment was that such a guarantee would be unwise in light of an agency's duty not to find itself regulating in the future "within the inflexible limits of yesterday." American Trucking Ass'n v. A.T. & S.F. RR. Co., 387 U.S. at 416.

Accommodation With Objectives In Area Of Children's Television

Since the adoption of the access rule in 1970, the factor of children's television viewing needs has assumed an increasing importance in the total public interest picture. On October 24, 1974, the Commission adopted its Children's Television Report and Policy Statement, 31 Pike & Fischer R.R. 2d 1228, in which it stated:

> One of the questions to be decided here is whether broadcasters have a special obligation to serve children. We believe that they clearly do have such a responsibility.... [B]ecause of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience (31 PR 2d at 1234).

Specifically, the Commission, mindful of a tendency to confine children's programming to Saturday and Sunday mornings, expressed its concern with the relative absence of children's programs on weekdays, including not only weekday afternoons but "early evenings as well." 31 RR 2d at 1237-38.

At this point two aspects of the access docket become crucially relevant. First, the Commission received numerous complaints from parents, educators and others particularly involved with children's affairs, including some complaints from children themselves, that children's programs presented by the networks on weeknights at 8 p.m. or later come "too late in relation to children's bedtime" (J.A. 100). Second, the Commission could not find that this scheduling deficiency in network programming for children was compensated for by the availability during early evening hours of children's programs produced for the access hour (J.A. 100).

Although the networks are not prohibited by the rule from beginning their three hours before 8 p.m., the fact that, except on Sunday, they do not and have not since 1971 offered their weeknight programs until 8 p.m. is a consequence directly traceable to this rule. Thus, the Commission was confronted with the necessity of making some adjustment in the access rule, lest this rule operate so as to frustrate the recently emphasized objectives for children's television. See General Telephone Co. of California v. FCC, 413 F.2d 390, 402 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969) (regulatory powers should not be compartmentalized in frustration of a pervasive regulatory scheme).

The particular remedy chosen by the Commission was one which it believed preferable to another[1/] as a means of facilitating the availability of children's television programs through a greater contribution from the network's proven resources for such programs.

The Exemption

The Commission said when it adopted the access rule that it would not attempt to prescribe the categories of programs which should be produced for access time. 23 FCC 2d at 397. However, the Commission reserved its right to see which categories flourished in the access market and which did not, and, where appropriate, to take corrective action. Thus, in resolving in the negative for the moment, the close question in 1970 whether to include an exemption for news programs and news documentaries the Commission said:

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1/ Sandy Frank wanted the Commission to tell the networks to begin their three hours of programming at 7 or 7:30 on those nights when they wish to show children's programs and thus leave time later during "the most valuable part" of prime time for access producers (p. 56). Under the Commission's remedy, the agency does not become involved in censorship, e.g. by requiring that a particular program be broadcast during a designated time period.

> We will review the categories of exemptions when the rule has been in operation for a reasonable length of time to determine whether the exemptions as presently included should stand, whether other categories of programming should be added, or whether some of the present exemptions should be deleted. (emphasis added). 25 FCC 2d at 334.

Four and one-half years later, the Commission has added an exemption for categories where it has found that access efforts have lagged behind (J.A. 100-102, 105, 108) while tailoring this exemption so as not to include in it categories where the access market has already flourished or is believed to have a realistic potential to develop successful material (J.A. 108-09).

NAITPD argues that the status of these three categories is no worse than it was at the time the rule became operative (42 et seq.). However, the Commission acted on the basis of the following evidence: two regular public affairs programs by the networks during prime time before the rule are no longer there [1/] (J.A. 101)

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1/ The fact that a former regular prime time public affairs program on CBS, 60 Minutes, has apparently done well in the ratings during fringe time, 6-7 p.m. Sunday, does not alter the fact, stated at the time of the original rule, that fringe time success is no substitute for prime time opportunity. 23 FCC 2d at 394. This opportunity is intended to embrace not only local public affairs programs (J.A. 92-93, 114) but also programs concerning issues of national moment which are most easily made available to licensees through the resources of the networks (J.A. 101, 105).

and network programs of interest to children were available to children at 7:30 before the rule whereas now, except on Sunday, they are not (J.A. 100).

Moreover, the Commission was entitled to consider factors supporting a conclusion that the situation today is not as conducive to the supply of public affairs, documentary and children's programs as it could be without the rule. Such a judgment is obviously not subject to demonstrative proof, but this is no bar to agency action based upon the use of its administrative expertise, provided the action is the result of a reasoned analysis. National Broadcasting Co. v. United States, 47 F. Supp. 940, 946 (S.D.N.Y.), affirmed, 319 U.S. 190 (1943).

The judgment upon which the Commission has acted in this instance is reasonable in light of the following considerations. The rule does make less time available for the networks; the Commission can not expect networks to be completely blind to the fact that programs in these three categories are not as economically feasible as some others -- thus pointing to a conclusion that the rule has contributed to an underutilization of network resources in these areas; finally, an overview of the access market

suggests it lacks the capacity to produce programs of these types. 1/ Consequently, the Commission concluded that PTAR I has had an inhibiting effect (J.A. 100-05). Bearing in mind that the deficient categories include speech which "is the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), and also are relatively more difficult to produce from an economic stand point, the Commission should be sustained in its conclusion that immediate corrective action favoring the use of the "tremondous resources" of the networks was appropriate (J.A. 105).

With particular reference to the decision to include within the exemption "documentary programs," without limitation to news documentaries, one additional argument supports the Commission. Experience in administering the rule revealed that the Commission was receiving a number of waiver requests for particular "off-network" programs. The total amount of access time consumed by the programs involved has not, in the Commission's judgment, been substantial enough to represent a serious threat to a viable market for access shows. However, the "off-network" requests were of sufficient frequency as to constitute an administrative

1/ The distinction between local and national public affairs programs has previously been noted. See p. 28, n.1.

burden for the agency, with the attendant danger that it would end up ruling on the requests on the basis of too great an evaluation of the particular programs involved. 1/

An examination of the "off-network" programs which were the subject of these requests, with one exception, showed them to be either children's specials or non-news documentaries (Supra at p. 5). The Commission therefore chose to make an adjustment in the rule in the light of experience so as to obviate the waiver problem in the future by exempting the relevant categories.

The criticism has been made that the Commission is merely substituting one form of involvement for another. This overlooks a crucial difference. Under the exemption, as is argued under Argument III herein, there will be room for reasonable, good faith judgments by broadcasters, whereas now, the Commission can not escape involvement once a licensee decides he wants to use an "off-network" program during his access period.

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1/ In the pending appeal concerning the America series, NAITPD has attacked the Commission on this ground, among others (Supra, p. 5 n.1).

Effective Date.

As this Court has recognized, there is a clear relationship between parties' contentions with respect to an effective date for any changes in the access rule and their views on the merits of the changes in issue. NAITPD v. FCC, 502 F.2d at 254. Seen thus in relationship to their other arguments, the protestations of NAITPD and Sandy Frank, both before the Commission and now this Court, concerning lead time are to be expected. These parties by attacking the merits of the changes hope to retain to the same degree the benefits they now enjoy of no network of "off-network" competition. Failing that, they hope to retain everything for at least sixteen months.

Contrary to their assertions, petitioners' present situation as far as their entitlement to lead time is concerned is distinguishable from last year when this Court upheld their claim. The Court's only holding in NAITPD v. FCC, supra, was that the notice given to petitioners there was inadequate in light of its "very great impact" upon their activities. The situation today is quite different. The impact is much less severe, and the petitioners were aware well in advance of the Commission's intent in this area.

Last year this court found the PTAR II effective date unreasonable because: (1) it would cause serious

economic harm to independent producers since it did not give those who had produced access programs in reliance on PTAR I sufficient opportunity to withdraw from those ventures without unnecessary expense; and (2) it did not give the networks adequate time to plan additional programming. 502 F.2d at 255.

The Court felt that the petitioners, having had "good reason" to rely on their status under PTAR I, were entitled to more than eight months "notice of intent" to reverse partially the PTAR I policy. 502 F.2d at 255. The Commission had relied on General Telephone Co. v. United States, 449 F.2d 846 (5th Cir. 1971) for its holding that an agency rule is not invalid merely because it has retroactive consequences or modifies pre-existing interests. However, this Court distinguished General Telephone noting that unlike the access producers in last year's case, the General Telephone petitioners should not have relied on the Commission's acquiesence in their activities because the Commission had for many years hinted that it might curtail those activities. 502 F.2d 255.

However, this year the access producers cannot claim that there were "no straws in the wind" prior to the issuance of PTAR III.[1/] They have had "notice of [the

1/ 449 F.2d at 864.

Commission's] intent" to modify PTAR I ever since the issuance of PTAR II. By September 1975 they will had had at least nineteen months to accommodate their activities to the minimal [1/] relaxation of PTAR I. As in General Telephone, petitioners here cannot, as they did last years, claim ignorance of the Commission's intent to take action which might curtail their activities.

Certainly nothing in the Commission's July 1974 Further Notice Inviting Comments can be construed to assure the access producers that PTAR I would be reinstated or that PTAR II would not become effective in September, 1975, as permitted by the Court, if the changes were upheld on their merits. The Further Notice was published in response to this Court's suggestion that the Commission, "utilize the additional time available to it to reconsider its changes in the rule." 502 F.2d at 255. The Court certainly anticipated that additional proceedings might be instituted, but it did not indicate that its suggested "further proceedings" would force a delay beyond September 1975. Indeed, its use of the phrase "additional time available" would have been misleading if the Commission could have used

1/ The Commission's position as stated earlier is that the contemplated change in the size of the access market is minimal. Thus, in discussing the matter of lead time, the Commission believes there is very little, if any, need for producers to "withdraw from" their access ventures, 502 F.2d at 253-254.

this time for further proceedings only upon pain of losing a September 1975 effective date.

Had the Commission elected to relax PTAR II even further, this Court's decision certainly did not foreclose it from extending lead time beyond September 1975. However, since the reconsideration resulted in a rule which abandoned most of the restriction in the size of the access market contemplated by the rule before this court last year, there was no compelling reason to delay the effective date beyond that already suggested by this Court. 1/

Concerning the need of the networks for adequate time to plan additional programming which was of concern to this Court in its June 1974 decision, 502 F.2d at 254-255, the Commission believes that the twelve-eighteen month

1/ Sandy Frank insists that the court in NAITPD v. FCC, supra, has ruled that a minimum notice period of 16 months must be allowed before any changes in PTAR I may be effectuated. (Sandy Frank Brief at 87). Frank concludes, therefore, that even if the Commission had reaffirmed PTAR II on the date of the Court's decision, June 18, 1974, it could not have implemented the rule for 16 months, or some time after October 18, 1975. This, of course, completely ignores the Court's explicit designation of September 1975 as an appropriate effective date. Furthermore, in urging the court to calculate lead time from the date of this Court's decision, Sandy Frank ignores the fact that the sixteen months relied upon by the Court in NAITPD v. FCC was measured from the date of the Commission's order (J.A. 166 and Brief at p. 89).

figure,which the Court seemed to suggest was an adequate lead time for the networks, would be relevant only if changes in the rule on the magnitude of those brought about when the rule itself was adopted were in issue, which is not the case. In view of the plans of the networks for some increase in their programs had the 1974 modifications been implemented (J.A. 87-77, para. 6), many of which had to be cancelled, a much shorter network lead time would appear to be sufficient for the limited number of additional network programs contemplated by the exemption currently in issue. See also CBS comments to this effect at J.A. 166-67.

If the minimum use of the exemption for children's programs is to be of any value to the public in 1975, a September effective date for the exemption appears to be of critical importance in view of the recent scheduling pattern for network children's "specials." The most popular season for such "specials," judging from an examination of past issues of TV Guide, seems to be between late October and early January, thus encompassing the Thanksgiving and Christmas holidays, as well as Halloween and New Year's Day.

In conclusion, the Commission believes that the public interest in implementing this September a new policy

found to be in the public interest is sufficiently great that more extensive lead time should not be granted unless compelling considerations of fairness, based largely upon lack of previous notice, to access producers require it. For the reasons previously stated, we do not believe that to be the case here.

A Rational Compromise.

The fundamental difference between NAITPD and Sandy Frank on the one hand and the Commission on the other is their refusal to accept any regulatory action concerning the prime time rule which pursues any goal other than their single-minded objective to preserve the access period created in 1971. However, the Commission is unaware of any doctrine which engrafts onto the general doctrine of agency discretion a restriction that one objective can not be pursued at the expense, however slight, of another. Such a doctrine would not square with this Court's recent reaffirmation of the Commission's authority to reach compromise decisions, provided the accommodation is one among factors, each of which in its own right is clothed with the public interest. NAITPD v. FCC, 502 F.2d at 257-58.

The compromise here is one which does attach considerable emphasis to the necessity of preserving an opportunity for access producers. Thus, the Commission abandoned most of the changes in PTAR II which this Court found would have "sharply restricted," 502 F.2d at 254, the access market. With respect to the exemption

now under discussion, the Commission acted to insure that its use, quantitatively speaking, would be kept to a minimum (J.A. 101, 103 and 115), with special emphasis on the need to preserve access time on Saturday, the night most conducive so far to local programs and hour-long access shows (J.A. 103).

If an overview of the use of the exemption indicates that stations are showing network and "off-network" programs during access time to an extent sufficient to be causing a serious impact upon the access market, the Commission has manifested a willingness to revisit this exemption (J.A. 103). It should be said here, however, that the Commission has no reason to believe this will prove necessary, relying, in part, upon the restraint with which a past waiver for one-time news and public affairs programs has been used (J.A. 101).

Certainly, the comments of dissenting parties at the Commission who are now before this Court reveal that there are those who would have preferred no compromise or one more conducive to their interests. They have every right to argue their points to the agency which depends upon the clash of views to assist it in reaching a decision.

But now the arena has shifted from the agency to this Court where the question has become, not the policy predilections of parties, but instead:

> '[W]hether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear'; that is, 'whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest."' (citation omitted) Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969).

By that test, the Second Report and Order should stand. 1/

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1/ The Commission has asked the Court to reconsider its order granting a motion for leave to file a brief amicus curiae on the issue of the applicability of Sangamon Valley Television Corp. v. U.S., 269 F.2d 221 (D.C. Cir. 1959). In the event the Court denies the pending motion, the Commission requests the Court to deny the relief requested by amicus for the reasons set forth in the Commission's motion.

## III. THE PRIME TIME ACCESS RULE AS MODIFIED DOES NOT VIOLATE THE FIRST AMENDMENT OR SECTION 326 OF THE COMMUNICATIONS ACT.

At the outset of this First Amendment discussion it is important to be precise as to the legitimate First Amendment issues that are involved in the context of the prime time access rule.

NAITPD argues (pp. 31-32) and Westinghouse suggests (p. 26) that the relaxation of the PTAR I restraint upon network speech would itself violate the First Amendment. In so doing, they seek to convert a regulation found to be constitutionally permissible in the face of a First Amendment challenge into one which is constitutionally required.

To the contrary, a prima facie issue under the First Amendment arises only when there is a governmental regulation in effect, either in the form of a statute or an agency rule, which restrains speech. Neither the failure to adopt the prime time access rule in the first instance, nor its subsequent repeal would leave in effect any governmental edict restraining speech. A fortiori, the relaxation of a constitutionally permissible restraint would not itself raise a relevant First Amendment issue.

The relevant First Amendment issues are two. First, can the Commission impose by rule an across-the-board restraint on network and "off-network" speech (the rule without exemptions) and second, can the Commission impose by rule a selective restraint on network and "off-network" speech (the rule with exemptions)? It is to these issues that we now turn.

Across-the-Board Restraint.

This Court has already answered the question whether the Commission can impose by rule an across-the-board restraint on network and off-network speech. The Court, in Mt. Mansfield, found that, "the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts. . ." 442 F.2d at 477. The Court carefully examined the rule's objectives and concluded that although it imposed a very real restraint on licensees, as a practical matter the rule was designed, "to open up the media to those whom the First Amendment primarily protects - the general public." Id. at 478. Consequently, the freedom of networks to distribute and of licensees to select programming are rights which may be abridged in the interest of promoting "the widest possible dissemination from diverse and antagonistic sources" over the broadcast media. Id. at 478. The case has not been made for revisiting this Court's carefully considered decision in Mt. Mansfield.

Warner Brothers, et al., urge the Court to overturn PTAR III because the rule has not increased the

diversity of program choices to the public. They indicate that the Court's only reason for upholding PTAR I in Mt. Mansfield was because of the Commission's hopes that overall diversity of programs for the public would be enhanced. (Warner Bros. Brief, 13). Of course, "diversity of programming was a hope, rather than one of the primary objectives" of PTAR I. (1974 Report and Order, para. 15). Nor did this Court in Mt. Mansfield suffer from any illusion regarding the purposes behind the rule:

> " . . . it is the stated purpose of that rule to encourage the 'diversity of programs and development of diverse and antagonistic sources of program service' and to correct a situation where '[o]nly three organizations control access to the crucial prime time evening television schedule." 442 F.2d at 477.
>
> and
>
> The prime time access rule is intended to promote "the widest possible dissemination from diverse and antagonistic sources . . ." (emphasis supplied).
>
> " . . . as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects - the general public." Id at 478.

It is obvious that the Court in Mt. Mansfield upheld the rule because it was primarily aimed at opening up time to non-network programs so that the public would

receive the benefits of programming produced by persons free of network influence. To this extent the rule has been successful. There is now opportunity for program producers to reach their audiences during prime time regardless of network approval or disapproval. Secondarily, both the Commission and the Court hoped that the rule would foster a greater variety of programs during access time.

To the extent that the court in Mt. Mansfield was influenced by its expectations with respect to diversity of programming that would result, we do not believe the case has been made for judicial revisit. The Commission felt that the rule had not yet received a fair test, and determined that more time was necessary before it could properly evaluate the rule's ultimate value in this area. It observed that the climate of uncertainty regarding the rule's tenure had had a discouraging effect on significant investments by access producers. Further, the first year of the rule's existence did not provide an accurate gauge since off-network and all feature film could be utilized in the access time. The Commission noted that there was not a total lack of diversity in access programs. Although the emphasis was on game shows, there were other programs, including animal

shows and musical variety shows. (J.A. 95). For these reasons, the Commission declined to repeal the rule for lack of sufficient program variety, electing instead to reaffirm it with a few minor modifications intended to increase such diversity during access time. It was hoped that by such action potential access producers will feel secure to invest in quality programming for the viewing public.

In light of these considerations, it is too early for the Commission or the Court to abandon the rule merely because one of its secondary goals has not yet fully materialized. The Rule's objectives are still just as compelling as they were in 1971, and they still far outweigh whatever slight First Amendment restraints may result.

Selective Restraint.

At the outset of this discussion regarding the Commission's power to impose a selective restraint on network and off-network speech, it should first be noted that the exemptions impose no such restraint upon broadcast licensees. The rule does not require, nor does it prohibit licensees from broadcasting any category of program. It is calculated to ensure that the broadcaster will have a wider range of programming from which he may select in his own best judgment those shows best qualified to serve the needs of his viewing community.

The PTAR III exemption restricts network First Amendment rights considerably less than the abridgements approved by this Court in Mt. Mansfield. The PTAR I across-the-board restraint has been relaxed. The exemption operates basically upon the three television networks, imposing a selective restraint upon their broadcast in the top fifty markets during one hour of the broadcast day.

Petitioners argue that the prima facie restraint upon speech of PTAR I is compounded by "selective exclusions

and distinctions" of PTAR III which are based not upon valid public interest considerations, but rather the idiosyncratic personal preferences of the Commission. Furthermore, they maintain that the exemptions constitute an impermissible classification system of "preferred" and "disfavored" programs. Primary reliance for these propositions is placed upon Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972). In our view, that reliance is misplaced. In Mosley, the Supreme Court struck down an ordnance that prohibited all picketing except "peaceful" labor picketing near school facilities. It found the regulation unreasonable since the City could not justify why "peaceful" non-labor picketing was prohibited. However, the Court concluded, "sufficient regulatory interests" might "justif[y] selective exclusions or distinctions . . . Conflicting demands on the same place may compel the State to make choices among potential users and uses." 408 U.S. at 98. See also Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

Unlike other contexts in which a prima facie restraint upon speech occurs, the salient fact about the broadcast media is "conflicting demands on the same place," i.e., the scarcity of spectrum available to satisfy the demands of every speaker. The traditionally-accepted view

is that this peculiar circumstance has justified more extensive intrusion into speech than would be permissible in other media. Red Lion Broadcasting Co., supra, 395 US at 390. Thus, Mosley cannot be controlling as regards particular regulations in the broadcast field. Even if applicable, however, it supports rather than refutes the argument that PTAR III categories are reasonable if they further First Amendment values.

Section 303 of the Communications Act, 47 U.S.C. 303, confers upon the Commission broad authority to regulate broadcasting as the "public convenience, interest, or necessity" requires. On the basis of this standard, the Commission is empowered by section 303(b), 47 U.S.C. §303(b), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." The Commission is further authorized to "[c]lassify radio stations ; provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. 303(a), (g) and (r).

The Supreme Court has made it clear that these provisions do not limit the Commission to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943). "[T]he Act," the Court held, "does not restrict the Commission merely to supervision of the traffic." Id. at 215-6. The Commission neither exceeds it powers under the Act nor transgresses the First Amendment "in interesting itself in general program format and the kinds of programs broadcast by licensees." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

In Red Lion, the Supreme Court upheld against First Amendment attack the "fairness doctrine," which restricted broadcasting stations' control over political statements. The Court's opinion there has a significance which reaches for beyond the category of programming dealing with public issues. The Court resolved the First Amendment issue in broadcasting by stating that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390. It stated further that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other

ideas and experiences which is crucial here. That right may not constitutionally be abridged either by the Congress or by the FCC." Id. This language, in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster, which the Commission is given considerable leeway to define. See also Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973).

In attempting to weigh the First Amendment claims of the public, broadcasters and others in this medium, the Commission must consider many factors in the balance, "a task of great delicacy and difficulty." Id. "Thus, in evaluating the First Amendment claims of respondents, one must afford great weight to the decisions of Congress and the experience of the Commission. . . the judgment of the legislative branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." Id.

The Commission has had extensive experience in the programming area, related to defining the public interest responsibilities of licensees. 1/ Furthermore, the Commission has exercised general affirmative responsibilities consistent with the First Amendment with respect to the "preferred" class of news and public affairs programming. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); see also New York Times v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); 47 U.S.C. 315(a).

Furthermore, the Courts have consistently upheld against Section 326 and First Amendment challenges program rules adopted by the Commission which assure wider diversity of programming sources, regulations which are broader and clearly more restrictive than adopted

1/ See, e.g., Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 34 (1929); rev'd on other grounds, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930); FCC, Report on Public Service Responsibility of Broadcast Licenees (1946) ("The Blue Book"); FCC, Report on Editoralizing by Broadcast Licenees, 13 FCC 1246, 1249 (1949) (fairness doctrine), Programming Policy Statement, 44 FCC 2303, 20 P.& F.R.R. 1901 (1960) (overall program categories); Fairness Report, 48 FCC 2d 1 (1974); FCC, Childrens Television Report and Policy Statement, 31 P. & F. RR. 2d 1228 (1974); FCC, Report on Broadcast of Violent, Indecent and Obscene Material, 7 (February 19, 1975).

in PTAR I and PTAR III. See, e.g., First Report and Order, 29 FCC 2d 201, 214 (1969), (Cable Television origination rule), aff'd sub nom. U.S. v. Midwest Video Corp., 406 U.S. 649 (1972); Fourth Report and Order, 15 FCC 2d 466 (1968), 47 C.F.R. §§73.641 - 73.644, affirmed sub nom. National Theatre Owners and Joint Committee Against Toll TV v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) (subscription television programming rules). See also 47 C.F.R. 73.641 - 73.644 (1974) and syndicated program exclusivity rules, 47 C.F.R. 76.151 (1972). In National Theatre Owners, supra, the Court of Appeals for the District of Columbia Circuit upheld against Section 326 and First Amendment attack program rules which excluded from subscription broadcast specific categories of programming including feature films, sports events, and television series. The Court found the "net effect" of these restrictions seemed "quite likely that the public in STV areas will receive more rather than less diversity of expression in its television programming by 'assur[ing] that existing economic forces were directed towards achieving maximum diversity of expression.'" Id. This ban on program types, the Court said, "was designed to preserve [economic balance in program sources] and to

insure against program duplication; thus. . . [e]ven if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss." Id. at 208, citing Banzhaf v. FCC, supra, 405 F.2d at 1102.

There is little question that the Commission has general authority to consider programming promises and past performance of licenees for purposes of license grant or renewal. 1/ As part of this authority it has been held that the Commission is required by the Act to consider whether a proposed change in program format (e.g. from classical music to popular) will deprive a significant segment of the community of a unique type of programming before approving an assignment of license. See Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, on rehearing, (D.C. Cir. 1974), Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970). 2/ The theory underlying the court's decision in both of these cases is that, "the FCC does have some responsibility, under its public interest mandate, for

1/ See, e.g. Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949).

2/ See also Citizens Communications Center v. FCC, 463 F.2d 822 (D.C. Cir. 1972), (Superior performance, including delivery of quality program, should be a plus of major significane in renewal proceedings).

programming content." Citizens Committee to Save WEFM, supra (Slip Op. at 17-18). The Court indicated that the Commission has an affirmative duty to, "assure that, within technical and economic constraints, as many as possible of the various formats preferred by segments of the public would be provided." Id.

The concept of exceptions from the prime time access rule is not one of first impression for this Court. The rule upheld by this Court in Mt. Mansfield contained, as does PTAR III, an exception for "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office." (§73.658(k)(2)). Further the Commission indicated in the PTAR I Order that it would consider waivers for certain sports events (23 FCC 2d at 395 n.35), and would approve waivers for one-half hour network news programs at 7 P.M. where preceeded by one full hour of local news. (Id. at 395 n.36). Thus petitioner's argument that such selective restraints constitute an impermissible infringement of First Amendment rights, flies in the face of the Mt. Mansfield holding.

With respect to the program categories of PTAR III, it should be noted that none of the petitioners has challenged either the specific exemption contained in PTAR I or the special exemption for regular half-hour network news programs when immediately adjacent to a full hour of locally-produced news or public affairs programming. Thus, their unqualified constitutional objections are themselves qualified.

Moreover, petitioner Westinghouse Broadcasting Co., (the original proponent of the prime time rule), urges the Court to find unconstitutional the very exemptions proposed by it in Comments it submitted for Docket No. 12782 (April 16, 1966):

"(i) programs of public significance or of national importance *** (ii) programs . . . presenting qualified candidates for national office***; (iii) live programs depicting important sporting, cultural and political events ***; (iv) news programs, including news, historical and controversial documentary type programs, prepared and produced solely by the network; and (v) such exceptions as the Commission may grant in the public interest upon request of a licensee." (Comments p. 12-14).

In addition, petitioner CBS (Brief, 14-21) would have this Court declare unconstitutional the exemption formulated by the Commission for news and public affairs programs and news documentaries whose very absence from PTAR I four years ago was viewed by CBS as a ground for finding that rule unconstitutional. (CBS Brief, Mt. Mansfield, 29, 29 F n.59). Indeed, the exemption was formulated, in part, to provide by rule what the Commission had granted in ad hoc waivers under PTAR I, an exception for one time news and public affairs programs. See Network Television Broadcasting, 23 FCC 2d at 395; Prime Time Access Rule, 32 FCC 2d 55 (1971).

The First Amendment and Section 326 place some limits upon the scope of Commission power. 1/ The Commission is forbidden to censor programs and to interfere with free speech. With respect to the no-censorhip

1/ There is considerable support in the legislative history of Section 29 of the Radio Act of 1927, which became Section 326 of the Communications Act of 1934, for the view that the no-censorship provision was declaratory of the First Amendment, as then interpreted. See Remarks of Mr. White, 67 Cong. Rec. 5480; Hearings on S. 1 and S. 1754, 69th Cong. (1926), 121 (testimony of Solictor Davis.) Thus, it may convey no broader scope with respect to the concept of First Amendment censorship. It is generally agreed, however, that the First Amendment is of broader scope than Section 326, with respect to the post 1934 developments in the law. See, e.g. Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1967). See also II Chafee, Government and Mass Communications 640-643(1947).

provision, it is clear that the Congress intended to prevent the Commission from deleting specific material and dictating what should go into particular programs. 1/ Thus, the Supreme Court in affirming the political attack-reply rules in Red Lion Broadcasting Co., specified the kinds of programming decisions which would raise more serious censorship problems than the specific fairness rules in issue in that case:

> "There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; or a discrimatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to §326..." 395 U.S. at 396.

In addition, governmental exercise of "supervisory control" over program content based upon a "selection among tastes, opinions and value judgments rather than a recognizable public interest" is similarly forbidden. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940); Banzhaf v. FCC, supra, 405 F.2d at 1096.

With respect to allegations that the Commission has censored or selected material by picking and choosing among program types, we must again point out that PTAR III

1/ Farmers Union v. WDAY, Inc., 360 U.S. 525, 527 (1959); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

does not bar the licensee from carrying any kind of programs whatsoever. The rule has not prohibited the broadcast of any kinds of programs; it has not required the broadcast of any kinds of programs. 1/ What the Commission has done is to prohibit broadcast of network and off-network programs by network affiliates in the top-fifty markets during a one hour period of the broadcast day. The exemptions merely permit licensees who choose to broadcast the exempted programs to present them at an early evening hour -- if they so desire. Here there has been no examination of thought or expression in order to prevent publication of "objectionable material." Farmers Union v. WDAY 360 U.S. 525, 527 (1959). Similarly, there has been no attempt to exercise "supervisory control of the programs" 2/ which licensees, thus liberated, elect to broadcast. As recognized in Simmons v. FCC, 169 F.2d 670, 672, cert. denied 335 U.S. 846 (1943), "censorship would be a curious term to apply to the requirement that licensees select their own programs by

1/ Indeed, the Commission went to great lengths pointing out that it was not suggesting that licensees carry such programs but merely making available an increased opportunity to carry them. (J.A. 20)

2/ FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

applying their own judgment to the conditions that arise from time to time." Here, censorship would be an equally curious term to apply to agency rules permitting licensees, who wish to carry these programs, the opportunity to use an earlier evening time period.

The questioned exemptions were formulated to remove the necessity for the Commission to make waiver decisions on individual programs, an exercise which raised the seeds of the general authority to censor denied by the Communications Act and the First Amendment. Here the Commission has not engaged in a subjective analysis of any program's content. Rather, faced with identifiable programming needs, it has made the determination that exemption of these categories would benefit the public interest. Nor does the Commission essay to exercise "supervisory control" over program content. A review of Commission decisions regarding administration of programming rules and policies bears out the contention that broad licensee discretion in giving specific content to these public interest duties has been preserved and encouraged by the Commission with faithful consistency.

The Categories Of Exemptions Are Not Unconstitutionally Vague.

Petitioners CBS, Warner Bros., Sandy Frank and NAIPTD all argue that the PTAR III exemptions are unconstitutionally vague. With little analytical precision,

Petitioners have leveled a broad fusillade of constitutional objections at exemption definitions and have conjured up a "parade of horribles". 1/ Contrary to their assertions, the definitions adopted by the Commission as to what programs constitute "news and public affairs" programs, "news and other documentaries" which are educational in nature, and "programs designed specifically for children" are sufficiently precise to guide the individual licensee in selecting programs and exercising his broad discretion in programming.

The vices of vagueness, as the Supreme Court pointed out in Interstate Circuit v. Dallas, 390 U.S. 676, 689 (1967) are "the lack of guidance [and fair notice] to those who seek to adjust their conduct and to those who seek to administer the law."

With respect to guidance provided to broadcasters by the definitions of news and public affairs programs, news documentaries and programs designed for children,

1/ As Mr. Justice Marshall pointed in Grayned v. City of Rockford, 408 U.S. 104, 110 (1971), "[C]ondemned to the use of word we can never expect mathematical certainly from our language. It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question," citing American Communications Assn. v. Douds, 339 U.S. 382, 412 (1950).

PTAR III's definitions are consonant with definitions contained in previous Commission rules and policy statements.

As to news and public affairs programs and news documentaries, it is extreme and almost ludicrous to suggest, as does NAITPL (Brief, p. 19) that licensees lack guidance in knowing the kinds of programs which would be permissible to accept from network sources. Numerous Commission reports, cases,and primers in the area of news and public affairs, 1/ as well as the renewal form documents (with which broadcasters are intimately familiar),2 / define that subject area. As to "programs designed for children," the PTAR III "Evening Programming Requirements" rule adopts the definition used by the Commission for "programs designed for children" in its recent Children's Television Report and Policy Statement, 31 P&F R.R. 2d 1228 (1974),

1/ See, e.g., FCC, Editorializing by Broadcast Licensees, 13 FCC 1246 (1949); FCC, Fairness Doctrine Primer, 40 FCC 598 (1964); FCC, Fairness Report, 48 FCC 2d 1 (1974); National Broadcasting Co. v. FCC, ___ F.2d ___ (1974) ("Pensions") (vacated pending rehearing en banc.)

2/ See Final Report and Order in Docket No. 19153, Renewal of Broadcast Licenses, 38 Fed. Reg. 28762 (paras. 164.196) (October 3, 1973); Memorandum Opinion and Order, "Formulation of Rules and Practices Relating to (paras. 105-111) (December 12, 1973); See also, Section IV-B, FCC Form 303, Instructions; 47 C.F.R. 73.670, Note 1 (Program Type Definitions).

as further clarified in the renewal form amendment, Memorandum Opinion and Order, No. 29785, (January 28, 1975). It should be noted that the Commission was, and is of the view that "programs designed for children twelve years old and under," i.e., those produced and broadcast primarily for a child audience as distinct from those designed for viewing by adult as well as child members of a family, may overlap in certain instances with other family oriented programs. 1/ It noted, in discussion of the issue in the broadcast license renewal proceeding, Docket No. 19153, 2/ that broadcasters had expressed no insuperable difficulties in interpreting what programs might fall within the definition for the purposes of program logging.

Petitioners attempt to invoke the specter of broadcast "capital punishment," i.e., denial of license renewal, for the mere misinterpretation of what does or

1/ The Commission assumed that networks will decide prior to offering children's programs for access use whether such programs compart with this definition. NBC has indicated no difficulty in determining whether a program is produced and broadcast primarly for children twelve years old and under. CBS apparently had no trouble in deciding what kinds of material would qualify under the similar "children's special" exemption in PTAR II, since it planned to broadcast such material at 7:30 P.M. on most Saturdays of the year. (J.A. 4-5).

2/ Memorandum Opinion and Order, Formulation of Rules and Policies Relating to Renewal of Broadcast Licenses, 38 Fed. Reg. 35398 (paras. 105-11) (Dec. 12, 1973).

does not constitute a program designed for chi[illegible] reflects an extreme view of the administrative process strongly rejected by this Court. In Lafayette Radio Electronics Corp. v. FCC, 345 F.2d 278, 281-2 (2d Cir. 1965), Judge Friendly rejected a similar vagueness attack with these sage remarks:

> "The FCC is not to be faulted simply because ingenuity can imagine borderline cases where a conscientious licensee might have fair doubt whether this communications were banned or not. In that even, he need only inquire, 5 U.S.C. 1004(d), 47 C.F.R. 1.2 (1964); and counsel for the Commission have assured us, as we would have supposed in any event, that, except in the most flagrant cases, the Commission does not induce the sanction of revocation or fines . . . save after giving the licensee warning and opportunity to mend his wasy."

They are equally applicable in this case. Indeed, the Commission's attempt to define rules which it ultimately adopted in the Second Report and Order was prompted by the numerous requests for waivers from PTAR I, many initiated by the very parties which here attack the rules. The Commission remains ready to offer its interpretation of the rules upon request by any party or licensee. These determinations, whether staff opinions or Commission orders, are subject to judicial review in any event. 5 U.S.C. 701 et seq., 18 U.S.C. 2341 et seq., 47 U.S.C. 402.

Further, to the extent Petitioners rely on a number of non-communications cases for broader attacks on the "roving commission" regarding author[illegible]rrogated to the FCC by its own rules, those cases a[illegible]pposite. For example, in Interstate Circuit v. Dallas, supra, cited by Petitioners Warner Bros. (Brief p. 36) and CBS (Brief p. 28), the Court struck down a motion picture classification system which reposed in an official licensing body the power to determine, with only the vaguest of guidance, whether a motion picture was unsuitable for children, and to impose criminal sanctions on exhibitors for violation of the offical censor board's instructions. Where criminal sanctions and censorship of arguably protected speech (viz., depictions of crime and violence) were concerned, the Court concluded, vague standards relegated too much discretionary power to government officials. In PTAR III, as in other Commission actions with respect to program content, 1/ the Commission does not contemplate substituting its judgment in place of the

1/ See, e.g., FCC, Report on the Broadcast of Violent, Indecent and Obscene Material, FCC 75-202 (February 19, 1975), p. 2, "With respect to the broader question of what is appropriate for viewing by children, the Commission is of the view that industry self-regulation is preferable ... [since] the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and judgments concerning the suitability of particular programs for children are highly subjective." And p. 7 "interpretation of which programs are appropriate for family viewing remains, as it should, the responsibility of the broadcaster."

licensee's. Nor does it censor any program or limit licensee discretion to choose any kind of program within the context of the rule's limits.

Finally, "in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little." Banzhaf v. FCC supra 405 F.2d at 1095-1096. On the one hand by saying too much, with great particularity, the Commission treads close to the line of forbidden censorship. On the other hand, it risks undue vagueness by saying too little. Thus, the Commission strikes a balance between particularlity and vagueness in every instance in the programming area -- it has resolved this dilemma in PTAR III by specifying with greater particularity the types of network programs which may be exempted from the one-hour prime time network program bar, and by affirming licensees' customary discretion in implementing the regulation. In doing so, the Commission believes it has fostered the purposes of the rule while avoiding censorship and pervasive supervision with respect to content. Indeed, it is the view of the Commission that the definitions adopted in the Second Report and Order will enhance the clarity of the rule for licensees, who must

make program selections, and for both independent and network producers and distributors, who must make the business judgments essential to foster wider programming during the access period.

If experience under the exemption indicates that the Commission is involved too frequently in advising licensees beforehand or second-guessing them later, then the Commission can revisit the exemption. If not the Commission, then this Court may revisit the exemptions, as it has already indicated it could do with respect to this very rule. Mt. Mansfield, supra, 442 F.2d at 479.

CONCLUSION

For the reasons stated, all petitions for review should be denied and the Commission's Second Report and Order upheld.

Respectfully submitted,

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